strike for a closed shop. Or in other words even after the advent of N.I.R.A. and its much publicized Section 7a, a strike for a closed shop should continue to be legal in Ohio. WILLIAM K. THOMAS

USE OF THE INJUNCTION TO PREVENT BREACH OF CONTRACT

The Hamilton Tailoring Company, of Cincinnati, Ohio, is a corporation employing about two hundred and fifty employees, engaged in the manufacture of clothing. Shortly after the N.I.R.A. was invalidated the employees evinced dissatisfaction with their wages and working conditions. While a strike was imminent the company presented to the employees a "contract of employment" which substantially all of them were induced to sign. No agreement on the question of hours and wages could be reached between the employer and the employees and on October 2, 1935, the members of the Amalgamated Clothing Workers Union within the shop, numbering about one hundred in all, voted to strike. The company filed a petition in the Common Pleas Court of Hamilton County for an injunction prohibiting the defendant union from "doing any act calculated to cause any employee to breach his contract of employment" and for other similar relief. The court denied the injunction on the grounds that the defendants were engaged in a legal strike and that the employment contract was void for want of mutuality in that during the first six months of its duration the employer had the right to terminate the same while an equivalent right was not vested in the employee. *Hamilton Tailoring Company* v. *Cincinnati Joint Board of Amalgamated Clothing Workers of America, et al.*, 4 Ohio Op. 295 (1936).

After this opinion was released but before the making of the journal entry the company drew up other contracts with its employees abrogating the original ones and attempting to meet the objection of the trial court by giving either party the right to terminate the agreement on fifteen days' notice. The case was then taken on appeal to the Appellate Court of the First District where the plaintiff company was permitted over objection to file supplemental petitions setting forth the new contract and alleging that the defendants had instituted a secondary boycott against the plaintiff subsequent to the filing of the original petition in the lower court. The Appellate Court reversed the holding of the trial court and enjoined all persuasion tending toward a breach of those contracts. It held both contracts valid without comment upon the law involved in the case. That court also granted a sweeping injunction against the secondary boycott.

The case was taken to the Supreme Court both on motion to certify and as of right. In that court the motion to certify was denied since, it was stated, no question of great public interest was presented. On the appeal as of right the defendants contended that the injunction violated their right of free speech as set out in Article 1, Section 11 of the Ohio Constitution, and that the admission of the supplemental petitions was a new cause of action originating in the Appellate Court contrary to Article 4, Section 6, and that if the case originated in the Appellate Court they were entitled to an appeal as of right under that section. The appeal was denied on the ground that no debatable constitutional question was involved. On petition for rehearing in which the last contention was stressed, the Court affirmed their former decision stating that no new issue was presented. *Hamilton Tailoring Co.* v. *Cincinnati Joint Board of Amalgamated Clothing Workers of America, et al.*, 132 Ohio St. 259 (1937).

Only two of the several interesting legal questions involved in this decision will be discussed in this comment. They are (1) the correctness and significance of the holding of the Appellate Court that the contracts involved are valid to an extent that the peaceful persuasion of the employees of the plaintiff to break such contracts is subject to injunction and (2) the propriety of the action of the Appellate Court in permitting the plaintiffs to file amended petitions containing a totally different contract from that under consideration in the trial court.

According to the present status of labor law it is legal for a body of men to band together into a labor union and to strike when a legitimate trade dispute exists. *The LaFrance Electrical Construction and Supply Co.* v. *International Brotherhood of Electrical Workers, Local No. 8, et al.*, 108 Ohio St. 61, 140 N.E. 899 (1928). It is also equally well settled that a union may use peaceful persuasion to further their ends provided that end is legitimate. *LaFrance Elc. Co.* v. *Brotherhood, supra,* and note in 2 Ohio St. L.J. 301 (1936). A labor union may induce the breach of contract at will with impunity but if the contract be for a term, persuasion—peaceful or otherwise—tending toward that end, is subject to injunction. *Parker* v. *Bricklayers' Union,* 10 Ohio Dec. Rep. 458, 21 Bull. 223 (1889). Peaceful picketing has been held subject to injunction if utilized to induce a breach of a term contract. *Fulworth Garment Co.* v. *International Ladies' Garment Workers' Union, et al.*, 15 Ohio N.P. (N.S.) 353, 27 Ohio Dec. 675 (1913). Thus the action of the Appellate Court in enjoining the defendants from peacefully persuading the employees of the plaintiff to quit their employment was consonant with previous Ohio decisions if the contracts in-

volved are considered to be binding contracts for a term. That these are binding contracts is open to some question. In paragraph (b) of the contracts of employment[1] it will be noted that there is vested in the employer complete control over the amount of wages that an employee may earn. Can a contract embodying such a provision be considered to have that mutuality of obligation necessary to a binding agreement? In the case of *Interborough Rapid Transit Co.* v. *Green,* 131 Misc. 682, 227 N.Y.S. 258 (1928), the New York court looked behind a contract drawn to support an injunction and declared it void for want of mutuality saying: "Whatever the status of the contract in law, the provisions

[1] Contracts of Employment

Contract of Sept. 6, 1935.

This agreement entered into this* * * by and between The Hamilton Tailoring Company, first party, and * * * second party, Witnesseth:

(a) That said first party hereby agrees to employ said second party for a period of six months from the above date, and said second party agrees to work for said first party during such period and to render faithful and efficient services to the satisfaction of said first party.

(b) In case said first party shall not have sufficient work for all employees because of any stoppage of work, dullness of trade, damage to its plant, or other cause beyond its control, it shall distribute its work among its employees as it may deem best, giving special consideration to such employees as may be operating under agreements similar to this; and said first party shall pay said second party only for work actually done by him.

(c) It is mutually agreed that the same basic rates as are now paid by said first party shall continue during the life of this agreement unless modified by agreement of the parties hereto.

(d) Said second party hereby agrees that he is not now, and will not during the life of this agreement or of any renewal hereof, become a party to any agreement the terms of which conflict with this agreement; and that he will in all respects conform with the policies, rules, and instructions of said first party and with no rules or authority in conflict therewith.

(e) It is further mutually agreed that at the expiration of this agreement, it shall continue until terminated by either party by 15 days' notice; provided, however, that said first party shall have a right at any time to discharge said second party for cause, such as disloyalty, breach of shop rules, incompetence, lack of diligence, insubordination or breach of the terms of this agreement.

Contract entered into subsequent to decision of trial court.

This agreement made and entered into this * * * between The Hamilton Tailoring Company of Cincinnati, Ohio, Party of the First Part, and * * * of * * * Party of the Second Part, Witnesseth:

(a) That First Party hereby employs Second Party for a term and period of six months from date and Second Party hereby agrees to work for said Party of the First Part for the said term and period of six months from date. In consideration of the foregoing covenants, said First Party agrees to pay to Second Party the same basic rate as is now paid by said First Party to said Second Party and said basic rate of pay shall continue during the life of this contract unless modified by agreement of the parties hereto.

(b) Should First Party, because of insufficiency or stoppage of work, dullness of trade, or other circumstances beyond its control, be unable to employ Second Party full time, Second Party shall be paid for such time as he is actually employed, or, if employed on a piece work basis, for such work as he actually performs.

(c) Either party may cancel or terminate this agreement by giving the other party fifteen days (15 days) notice in writing of the intention so to do.

(d) Any prior and/or existing contract between the parties is for valuable consideration hereby rescinded.

(e) In witness whereof the Parties have signed this agreement in duplicate this * * * 1935.

* * * are inequitable." It was further stated, "Where an employee abandons all right to leave the service of his employer, whereas the employer reserves practically entire freedom to discharge him, there is no compensating consideration." Since the power to limit the amount of work that an employee might receive, and as a consequence the amount of his wages is almost equivalent to the power to discharge, it is submitted that this celebrated case furnishes excellent authority upon which to base the conclusion that the contracts in the case at bar are void for want of mutuality. This conclusion is further strengthened by the fact that in the *LaFrance* case, *supra*, the Ohio Supreme Court evinced the same tendency to look behind a spurious labor contract. It is obvious that the primary purpose of these contracts was to prevent the employees of the Tailoring Company from being called out on strike. A necessary corollary of this objective was to prohibit unionization of the plaintiff's employees, for to what purpose is unionization in such a situation if the employee may not subsequently engage in a strike? This result directly contravenes the avowed public policy of this state as set forth in our statute outlawing yellow-dog contracts (quoted below). Ohio G.C. 6241-1. This furnishes a further reason why these contracts should have been declared invalid.

Aside from this, clause (d) of the first contract seems clearly invalid under the yellow-dog statute. In that clause it is stated, "Said Second Party hereby agrees that he is not now, and will not during the life of this agreement or of any renewal hereof, become a party to any agreement the terms of which conflict with this agreement; and that he will in all respects conform with the policies, rules, and instructions of said First Party and with no rules or authority in conflict there with." In Ohio G.C. 6241-1 it is stated, "Every undertaking * * * whereby (a) either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization * * * is hereby declared to be contrary to public policy and wholly void." While this point was not raised directly it is submitted that the Appellate Court has done much toward emasculating the yellow-dog statute by declaring the first contract to be a valid labor agreement without mention of this clause.

While not as important from the standpoint of labor law, the action of the Appellate Court in permitting the filing of the supplemental petitions setting forth the contract entered into subsequent to the decision in the court below seems no less questionable. The Constitution of Ohio as amended in 1912 provides that the parties to an equity action are entitled to a trial *de novo* in the Appellate Court. Ohio Const., Article

4, Section 6; *Kirkias* v. *Fountas*, 109 Ohio St. 553, 143 N.E. 129 (1924). Thus the parties have the same right to file supplemental petitions in the Appellate Court as they have in the trial court. *McCormick* v. *McCormick*, 124 Ohio St. 440, 179 N.E. 286 (1931). The Ohio statute provides generally that either party to an action, on compliance with prescribed conditions, "may be allowed to file a supplemental petition, answer, or reply alleging facts material to the case which occurred since the filing of the former petition, answer, or reply." Ohio G.C. 11,368. Cases discussing this section have regarded the supplemental petition as only ancillary to the original petition. It may never be used to set up a new cause of action. *Gibbon* v. *Dougherty, et al.*, 10 Ohio St. 365 (1859); *Hiler* v. *Hiler*, 14 Ohio App. 174 (1921); *McGuire* v. *Louis Snider Paper Co.*, 6 Ohio Dec. 392, 4 N.P. 262 (1897). Thus the point narrows down to the question whether the filing of the supplemental petitions was merely bringing before the court matters incident to the original cause of action or whether the new contract and the breach thereof constitute a new cause of action. The limited scope of this paper necessarily prohibits an extended discussion of the nature of a "cause of action." Whether we accept the view advanced by Pomeroy that the cause is limited and determined by a primary right, Pomeroy, *Code Remedies* (5th Ed., 1929) 526-548; *Hahl* v. *Sugo*, 169 N.Y. 109, 62 N.E. 135 (1901); or whether we consider it to be a group of operative facts giving rise to one or more right or rights of action, Clark, *The Code Cause of Action*, 33 Yale L.J. 820 (1924); *Craft Refrigerating Co.* v. *Quinnipiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76 (1893), it is difficult to consider the cause of action available to the Tailoring Company in this instance to be other than a group of rights of action arising out of their legal right to be protected in their contractual relation with their employees created by the contract on which the suit was originally brought. If this be true then only actual or contemplated infringements upon that legal right might form the subject of supplemental petitions in either the Trial or the Appellate Court. The acts of the defendants tending to induce a breach of a contract distinct from that involved in the original action cannot be classed as incident to a cause of action arising out of that previous contractual relationship. See *McGuire* v. *Louis Snider Paper Co.*, *supra*. Thus it would seem that the Appellate Court, by allowing the filing of the supplemental petition, permitted a new action to be instituted in that court contrary to Article 4, Section 6 of the Ohio Constitution which provides that the Appellate Court shall have original jurisdiction only as to the five extraordinary writs, and Appellate jurisdiction in the trial

of chancery cases. It may be well to point out that the defendants were little prejudiced by this action on the part of the Appellate Court. From the opinion of the trial judge it is apparent that a proceeding based upon the substituted contract would have resulted in a decision adverse to them. This, however, cannot justify unorthodox procedure.

According to the decision in this case a labor organization may take no active measures, such as picketing, etc., to induce employees to leave their employment in a plant in which they are bound by one of these so-called "contracts." Furthermore, if the employees should become members of the union the issuance of a strike order would be subject to injunction. *Grassi Contracting Co.* v. *Bennett*, 174 App. Div. 244 (N.Y., 1916), and cases there cited. If the union should succeed in organizing the employees and calling them out on strike the union itself would probably be subject to an action at law for damages done the employer as a result of the breached contract. *Parker* v. *Bricklayers' Union, supra*, and see note in 3 Ohio St. L.J. 237 (1937). Under the second contract one loophole seems to be left, although it is of doubtful value. While that agreement is ostensibly for a term it is terminable by either party at fifteen days' notice. It would seem probable, then, that no action would lie against a labor organization for inducing an employee to give notice and quit at the end of the fifteen-day period. This would follow logically from the accepted proposition that it is not illegal to induce another to do a legal act. *LaFrance Elec. Co.* v. *Brotherhood, supra.* The first contract contains no such loophole, however, and a general utilization of an agreement of that sort will effectively tie the hands of labor groups.

As was previously stated the Supreme Court refused a motion to certify thereby declaring that no question of great public interest was involved in this case. Some idea of the importance ascribed to the case by labor organizations may be gathered from the fact that twenty different groups joined as *amici curiae* to present briefs to the Supreme Court. Yet the court held that it was not of sufficient public interest to warrant a hearing. It is submitted that this evasion of a question of vital import to every employer and employee, especially in view of the present trend toward unionization of industry, is indefensible.

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